THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case No: 333/05
Reportable

In the matter between

THE MEC FOR THE PROVINCE OF KWAZULU-NATAL RESPONSIBLE FOR SOCIAL WELFARE AND DEVELOPMENT **Appellant**

and

Q T MACHI & OTHERS **Respondents**

Coram: HARMS, SCOTT, MTHIYANE, LEWIS JJA et MAYA AJA

Heard: 11 May 2006
Delivered: 31 May 2006

Summary: Whether an order of costs *de bonis propriis* suspended pending the furnishing of further affidavits is appealable.
Neutral citation: This judgment may be referred to as MEC: Welfare (KZN) v Machi [2006] SCA 83 (RSA)

JUDGMENT

MAYA AJA

MAYA AJA

[1] Section 27(1)(c) of the Constitution confers a right on every person ‘to have access to social security, including, if they are unable to support themselves and their dependants, appropriate social assistance’. Subsection (2) enjoins the State to ‘take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of [this right]’.

[2] The Social Assistance Act 59 of 1992 (‘the Act’) requires the Minister for Welfare and Population Development, with the concurrence of the Minister of Finance, amongst other things to make social grants, grants-in-aid, supplementary grants, child support grants, foster child grants and care-dependency grants out of monies appropriated by the Provincial Legislature. The administration of the whole Act (excluding s 13) was assigned to the provinces by Proclamation R7 of 23 February 1996. Accordingly, applications for social and child-support grants have to be made to the relevant director-general of a province who must be satisfied, *inter alia*, that the applicant complies with the prescribed conditions. If an applicant is aggrieved by a decision of the director-general, the applicant may appeal to the relevant provincial member of the executive council.

[3] Delivering on this constitutional obligation and applying the provisions of the Act seems to have been a monumental challenge for the various provincial welfare departments also in KwaZulu-Natal (‘the department’). In the judgment delivered by JH Combrink J, sitting in the Pietermaritzburg High Court, it emerged that the Pietermaritzburg and the

Durban high courts have, since the year 2000, been inundated with a massive and ever-increasing volume of litigation by thousands of indigent applicants for social assistance seeking relief against the department as a result of its failure to expeditiously process their applications and appeals (where their applications have been refused) or where the beneficiaries had not been paid their grants after they had been approved. In some cases the applicants' complaints related to arbitrary cancellation of the grants without notice or explanation.

[4] More than 26 000 applications had been filed in these courts between the beginning of 2000 and 8 March 2005, when the court *a quo* delivered the judgment appealed against. Only one of those adjudicated was on an opposed basis. The rest were settled or orders were granted by default in favour of the various applicants with the department consequently paying millions of rand in legal costs, at a huge loss to the fiscus, as it had no defence to the claims. As at 20 January 2005 over 18 000 such cases had been lodged in the two divisions during the previous year and awaited enrolment. It is unnecessary to describe the disruptive impact of this unprecedented phenomenon on the general functioning of the courts, which are hardly equipped to handle such volumes of litigation, in addition to their ordinary roll of cases.

[5] During motion court hearings in the period 20 to 28 January 2005, the case rolls in the two courts were, as had come to be expected, clogged with such applications. In one of the matters the applicant was a deaf, mute woman. An application for a disability grant that she lodged in 1999 was apparently never processed despite her numerous written enquiries to the

department over the years, which all went unacknowledged and unanswered. Another matter involved an elderly woman whose old-age pension was abruptly cancelled without notice after having been a beneficiary for several years. Her several enquiries to the department elicited no response. The applicants in the other matters told similar stories of hardship and frustration suffered at the hands of the department. They all approached the court because of the department's inaction after exhausting every possible remedy.

[6] It appears from the judgment of the court *a quo* that it was not particularly concerned with the merits of the individual applications before it. The court's specific intention was to devise a means by which the apparent, long-standing crisis could finally be resolved. Towards that end, the applications enrolled for hearing on 20 January 2005 were not considered individually but as a group. A rule nisi was then issued calling upon the appellant to show cause why an order of costs *de bonis propriis* should not be awarded against him in these applications because, so the court felt, there was reason to believe that the MEC had failed to comply with his duties.

[7] Subsequent thereto, the appellant filed affidavits in which he explained the problems he found in the department when he took over in May 2004. He attributed some of the problems to the HIV-Aids pandemic which caused a massive escalation of applications for social assistance, fraud perpetrated by some of the applicants and the employees of the department, budgetary constraints which prevented, for example, employment of more staff, and lack of co-operation from the office of the State Attorney, which allegedly did not properly forward notices of motion to the department. The

appellant described various measures he had devised to deal with the problems. These included a business plan embodied in a memorandum to cabinet and a forensic investigation into the fraud. Although the investigations disrupted the implementation of such initiatives, as it involved the removal of millions of relevant files from the department's custody, it nevertheless yielded positive results.

[8] The Black Sash Trust was allowed to join in the proceedings as *amicus curiae*. It is a non-profit organization which, through advice centres, serves the aged and the disabled, and advances children's rights. Thousands of their clients are litigants in the social assistance cases who embarked on the litigation because their applications were delayed and their appeals remained unresolved without explanation, despite the Trust's numerous efforts to resolve the cases in a non-adversarial manner. In the Trust's view, formed from its regular interaction with the department, the root of the problem as described in its affidavit was 'the abysmal and endemic failure of a department that is in disarray and which considers its constitutional obligations to be an alien imposition.' The Trust, however, did not support the costs order contemplated by the court as it did not believe that it would solve the problem, and instead proposed the issuing of a structural interdict.

[9] In an unprecedented move and responding to the appellant's attack on its competence, the State Attorney, KwaZulu-Natal, acting independently of the appellant, made submissions explaining his office's unavailing attempts to assist the department in stemming the long-standing and ever-increasing tide owing to the department's persistent failure to provide instructions properly and its unwillingness to accept their proposals.

[10] The court *a quo* held, *inter alia*, that the department and its functions under the Social Assistance Act were being mismanaged on a gross scale, that incompetence in the department was rife and that there was an inability to deal with the very subject matter which was entrusted to the department by the Act. Whilst accepting that the appellant had inherited a troubled department, the court *a quo* found that during his year in office the appellant had not done much to resolve the crisis, least of all reducing the backlog of appeals which fell within the scope of his specific ministerial functions. It concluded that the appellant's conduct in the discharge of his duties envisaged in the Act was unreasonable, negligent and *mala fide*, thus warranting a special order of costs *de bonis propriis* in respect of all the applications under its consideration. However, the operation of the order was suspended until 29 July 2005 on which day the appellant and other interested parties were given the opportunity to persuade the court that the backlog in the applications and the appeals had been totally eliminated or at least substantially addressed, failing which the order would forthwith be implemented.

[11] An application for leave to appeal against this order was sought and granted by Hugo J on 23 June 2005. The parties nevertheless filed their affidavits thereafter in compliance with the order of 8 March. From these affidavits it appears that the special costs order had some effect as the department suddenly began to deal with the matters much more expeditiously. Additional staff and an *ad hoc* Appeal Board were appointed. In certain districts, big workforces comprising all the relevant officials essential to process a social grant to finality and to hear appeals were deployed to deal with new and pending applications and expedite the hearing

of appeals which resulted in thousands of applications and appeals being finalised in a matter of days. This information, together with other facts not previously furnished to the court *a quo*, but showing the appellant in a more positive light, could not, however, be considered by JH Combrink J on 29 July 2005 as the appeal was already pending at that stage.

[12] We have to decide at the outset whether Hugo J was entitled, at that stage of the proceedings, to grant leave to appeal. Leave can only be granted in respect of a 'judgment or order'. The test in determining whether a judgment is a 'judgment or order' has recently been restated in *S v Western Areas Ltd and others* 2005 (5) SA 214 (SCA). Howie P said (para 20):

'Appeals are, generally, precluded before final determination of a case unless the judicial pronouncement sought to be appealed against, whether referred to as a judgment, order, ruling, decision or declaration, has three attributes. First, it must be final in effect. That means it must not be susceptible of alteration by the court appealed from. Second, it must be definitive of the rights of the parties, for example, because it grants definite and distinct relief. Thirdly, it must have the effect of disposing of at least a substantial portion of the relief claimed. Clearly, whether these criteria are met does not depend on judicial discretion.'

See also *Zweni v Minister of Law and Order* 1993 (1) SA 523 (A) at 532J-533A.

[13] As we understand the somewhat ambiguous order of JH Combrinck J, its objective, rightly or wrongly, was to provide the court *a quo* with some leverage in a bid to have the backlogs addressed. It was not put into effect immediately, but was suspended pending the filing of further affidavits to explain the backlogs at a future date: clearly, the court *a quo* had not arrived at its final conclusion in the matter. Counsel for the appellant was

constrained to concede that were it not for the intervening application for leave to appeal, it would have been competent for the court *a quo* to reconsider and alter or withdraw its order on 29 July 2005, depending on the nature of the information placed before it at that stage. That concession, which was correctly made, disposes of the argument that the order was final. In our view, the order was not final in effect. That being so, the application for leave to appeal was premature and ill-conceived and should not have been granted.

[14] Counsel for the appellant sought to contend that the decision of the court *a quo* was appealable as it disposed of a specific issue: that the respondent's conduct was *mala fide* and that it warranted a special costs order. We do not agree. The court's reference to *mala fides* was a finding of fact. The focus of counsel's attack in so far as it targets the mere finding of fact is misplaced. Findings of fact cannot be appealed against; only a 'judgment or order' is appealable. There is thus no merit in the submission.

[15] The issue of costs does not arise because the other interested parties did not take part in the appeal. Mr PJJ Zietsman of the Free State bar appeared at the request of the court and we wish to thank him for his assistance freely given in one of the great traditions of the bar.

[16] The appeal is accordingly struck from the roll.

MML MAYA
ACTING JUDGE OF APPEAL

CONCUR:

HARMS JA
SCOTT JA
MTHIYANE JA
LEWIS JA